

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 14, 2008 Session

**THOMAS GEESLING, INDIVIDUALLY AND AS ADMINISTRATOR  
OF THE ESTATE OF SHARON GEESLING v. LIVINGSTON  
REGIONAL HOSPITAL, LLC**

**Direct Appeal from the Circuit Court for Overton County  
No. 4091-T John A. Turnbull, Judge**

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**No. M2007-02726-COA-R3-CV - Filed December 18, 2008**

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The trial court granted summary judgment to the defendant in this medical malpractice case after finding that the affidavit of plaintiff's nursing expert failed to meet the requirements of Tenn. Code Ann. § 29-26-115. Based upon our conclusion that the trial court did not abuse its discretion in holding that the affidavit of plaintiff's expert witness did not satisfy Tenn. Code Ann. § 29-26-115, we affirm the decision of the trial court.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., and ANDY D. BENNETT, J., joined.

Phillip L. Davidson, Nashville, Tennessee, for the appellant, Thomas Geesling, individually and as Administrator of the Estate of Sharon Geesling.

C.J. Gideon, Jr. and Brian Cummings, Nashville, Tennessee, for the appellee, Livingston Regional Hospital, LLC.

## **OPINION**

### **I**

#### **A**

Sharon Geesling, a disabled 56 year old woman, was admitted to the Emergency Department at Cumberland River Hospital on June 17, 2005 by Clay County Adult Services (CCAS) due to possible neglect after Ms. Geesling was found in her home by CCAS dehydrated and with missing medications. Ms. Geesling was found to have a Stage I decubitus ulcer to the right side of her coccyx.

Ms. Geesling was transferred to the Livingston Regional Hospital Emergency Department on June 17, 2005, where Dr. Larry Mason made an initial diagnosis of adult neglect. She was subsequently transferred to Livingston Regional for admission and to obtain an Adult Protective Services evaluation / consult. Ms. Geesling's admitting diagnosis was for possible abuse, protective service, and left hemiplegia. She remained at Livingston Regional Hospital until June 23, 2005, the date of her fall.

At 5:30 on the afternoon of June 23, 2005, Ms. Geesling was taken via wheelchair to be weighed. Upon return to her room, Ms. Geesling informed the nurse, Melanie Moore, L.P.N., that she did not want to return to bed just yet. Nurse Moore gave Ms. Geesling the call light to hold and then allowed her to remain in her wheelchair. For approximately forty-five minutes, Nurse Moore and Joanna Brownwell-Hill, C.N.A., continued to monitor Ms. Geesling by checking in on her and asking if she was ready to get back in bed.

At approximately 6:40, Ms. Geesling was found laying on her right side on the floor of her room, with a laceration to her right eye, edema in her right orbital area, and with two fingers bruised. Ms. Geesling was transferred to a stretcher via a back board and taken to the ER to be evaluated and for a CT of the head without contrast to be performed. The Impression of Ms. Geesling's head CT was dictated by Dr. Kate Tobin with Virtual Radiologic Consultants. Dr. Tobin found a right subdural hematoma with mass effect and blood in the interhemispheric fissure, which may have represented a subdural interhemispheric collection of subarachnoid blood. There was also a mild right-to-left midline shift of at least 5 mm. Ms. Geesling was subsequently transferred to Cookeville Regional Medical Center, where she died on June 26, 2005.

#### **B**

This medical malpractice action was filed on January 6, 2006, by Ms. Geesling's husband, Thomas Geesling, individually and on behalf of the estate of Sharon Geesling. The complaint alleges that the nursing staff of Livingston Regional Hospital violated the applicable standard of care, thereby causing Ms. Geesling's fall and eventual death. The defendant filed a motion for summary judgment supported by a Memorandum of Law, a Statement of Undisputed Facts, and the affidavit of their medical expert Dawn Haynes,

R.N. The defendant's motion was heard on November 2, 2007. The trial court found that the affidavit from Cindy Wilson, R.N., the plaintiff's sole medical expert, did not satisfy the requirements for competency and admissibility under Tenn. Code Ann. § 29-26-115 and was therefore inadmissible. The trial court granted defendant's motion for summary judgment, holding that the plaintiff had failed to create a genuine issue of material fact to effectively oppose the defendant's motion.

Specifically, the trial court held that:

- (1) The affidavit filed by the Plaintiff fails to state that the affiant is familiar with the standard of care that applies to "nurses," regardless of the type of medical community involved, in a case involving alleged negligence / malpractice by nurses;
- (2) The affidavit filed by the Plaintiff fails to state that the affiant is familiar with the medical community in Livingston, Tennessee (where the alleged negligence / malpractice occurred) or with a similar medical community to assert any familiarity with the applicable standard of care for Livingston, Tennessee or a similar medical community to satisfy "the locality rule," but it instead offers only a familiarity with a regional standard of care ("Upper Cumberland"); and,
- (3) The affidavit filed by the Plaintiff fails to state or otherwise establish what any alleged nursing standard of care requires, but it instead merely offers general criticisms / deviations from an unidentified and undefined standard of care.

## II

Summary judgment is appropriate only when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Martin v. Norfolk Southern Railway*, \_\_\_ S.W.3d \_\_\_, 2008 WL 4890252 (Tenn. 2008); *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, \_\_\_ S.W.3d \_\_\_, 2008 WL 4790535 (Tenn. 2008). If a moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *Martin*, \_\_\_ S.W.3d at \_\_\_\_.

The resolution of a motion for summary judgment is a matter of law. We review an award of summary judgment *de novo*, with no presumption of correctness afforded to the trial court. *Guy v. Mut. Of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002).

Tennessee trial courts are granted broad discretion when determining the “admissibility, qualifications, relevancy, and competency of expert testimony.” *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997). Therefore, we review a trial court’s decision regarding expert witness competency and qualifications under an abuse of discretion standard. *Robinson v. LeCorps*, 83 S.W.3d 718, 725 (Tenn. 2002); *Taylor v. Jackson-Madison County Gen. Hosp. Dist.*, 231 S.W.3d 361, 371 (Tenn. Ct. App. 2006). The Tennessee Supreme Court has defined an abuse of discretion as “an erroneous conclusion or judgment on the part of the trial court – a conclusion that was clearly against logic (or reason) and not justified.” *Foster v. Amcon Int’l, Inc.*, 621 S.W.2d 142, 145 (Tenn. 1981). Thus, the trial court’s decision will be upheld “‘so long as reasonable minds can disagree as to the propriety of the [trial court’s] decision.’” *Riley v. Whybrew*, 185 S.W.3d 393, 399 (Tenn. Ct. App. 2005) (quoting *State v. Scott*, 33 S.W.3d 746, 751 (Tenn. 2000)). When our review arises from a trial court’s award of summary judgment, however, we must view statements made in the expert’s affidavit in the light most favorable to the non-moving party, drawing all reasonable references in that party’s favor. *Kenyon v. Handal*, 122 S.W.3d 743, 751 (Tenn. Ct. App. 2003).

### III

#### A

A plaintiff’s burden in a medical malpractice case is set forth in Tenn. Code Ann. § 29-26-115. This statute provides in pertinent part:

(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty therefore, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant’s negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person’s expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. ...

Tenn. Code Ann. § 29-26-115(a)-(b).

As set forth in the statute, a plaintiff in a medical malpractice action must produce expert evidence to establish the standard of professional care in the community in which a defendant practices or in a similar community. This is known as the locality rule. In order to satisfy this rule, a medical expert relied upon by a plaintiff “must have knowledge of the standard of professional care in the defendant’s applicable community or knowledge of the standard of professional care in a community *that is shown to be similar* to the defendant’s community. *Robinson*, 83 S.W.3d at 724. The plaintiff’s tendered expert must show a familiarity with the community in which the defendant practices or in a similar community or else the plaintiff will be unable to demonstrate a breach of duty. *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997) (citing *Cardwell v. Bechtol*, 724 S.W.2d 739, 754 (Tenn. 1987).

The appellant first alleges that the trial court erred in holding that the affidavit of the appellant’s expert did not meet the requirements of Tenn. Code Ann. § 29-26-115(a). The appellant challenges the trial court’s holding that a familiarity with a regional standard of care does not satisfy the requirements of the locality rule. The crux of the appellant’s first argument is that the locality rule is satisfied by showing a familiarity with a geographical or regional standard of care.

The locality rule requires that an expert establish a familiarity with the standard of care in that medical community or a similar medical community. This court has previously stated that expert testimony may not be based solely on familiarity with a regional standard of professional practice. *See Allen v. Methodist Healthcare Memphis Hospitals, et al.*, 237 S.W.3d 293, 296 (Tenn. Ct. App. 2007); *Eckler v. Allen*, 231 S.W.3d 379, 386 (Tenn. Ct. App. 2006); *Johnson v. Pratt*, No. W2003-02110-COA-R3-CV, 2005 WL 1364636, at \*7 (Tenn. Ct. App. June 9, 2005) (*no perm. app. filed*). The court noted in *Eckler v. Allen* that “evidence of knowledge of a national, regional, or even state-wide standard of professional practices does not suffice under the locality rule set-out in T.C.A. § 29-26-115(a).” *Eckler*, 231 S.W.3d at 386. In short, for an expert’s testimony to meet the locality rule, that expert must establish a familiarity with the standard of care in that medical community or a similar medical community, not merely a familiarity with a regional standard of care.

Upon reviewing the record in this case, we find that the trial court did not abuse its discretion in holding that the appellant failed to meet the requirements of Tenn. Code Ann. § 29-26-115(a). In her affidavit, Nurse Wilson states that she is currently employed by Cumberland Medical Center in Crossville, Tennessee. She further states that she is familiar with the standard of care for hospitals in the Upper Cumberland Community, the region where she has practiced nursing for the last 27 years. While she states a familiarity with the Upper Cumberland region, her affidavit does not state that she is familiar with the standard of care in Livingston, Tennessee. Nor does she state that Livingston and Crossville are similar communities for purposes of the locality rule.

The appellant relies upon *Conley v. Life Care Center of America*, 236 S.W.3d 713 (Tenn. Ct. App. 2007), for the proposition that familiarity with a regional standard of care is sufficient to meet the locality rule. The affidavit relied upon by the appellant and the affidavits in dispute in *Conley* are distinguishable, however. The affidavits in *Conley*, in establishing a familiarity with the medical community in Centerville, Tennessee, referred to the “geographic region around Centerville, Tennessee.” *Conley*, 236 S.W.3d at 742. By specifically referencing Centerville in their affidavits, the experts in *Conley* established that they were familiar with the standard of care in Centerville and the surrounding area, not simply a geographic region that happens to include Centerville. Nurse Wilson’s affidavit, however, refers only to the “Upper Cumberland community”, not Livingston, Tennessee and the Upper Cumberland Community around Livingston. Unlike the affidavits in *Conley*, Nurse Wilson’s affidavit does not contain a specific reference to knowledge of the Livingston, Tennessee community.

Furthermore, we review a trial court’s decision regarding expert witness competency and qualifications on an abuse of discretion standard. The trial court in this matter did not abuse its discretion in holding that knowledge of the standard of care in the “Upper Cumberland community” does not satisfy the requirements of the locality rule. Because the trial court did not abuse its discretion in holding that Nurse Wilson’s affidavit did not meet the locality rule set forth in Tenn. Code Ann. § 29-26-115(a), we affirm the decision of the trial court.

## B

The appellant next challenges the trial court’s ruling that the affidavit of Nurse Wilson fails to state or otherwise establish what any alleged nursing standard of care requires. The trial court found that Nurse Wilson’s affidavit offers only general criticisms / deviations of an unidentified and undefined standard of care, which is not sufficient to meet the plaintiff’s burden of proof placed upon him by Tenn. Code Ann. § 29-26-115(a)(1).

Tenn. Code Ann. § 29-26-115(a)(1) states that the claimant shall have the burden of proving by evidence the relevant recognized standard of care. The court will not presume negligence on the part of the defendant. Tenn. Code Ann. § 29-26-115(c). Rather, it is the plaintiff who is charged with the burden of proof as to the standard of care in the community in which the defendant practices or in a similar community. *Mabon*, 968 S.W.2d at 831. Without evidence as to the standard of care in the community in which the defendant practices or in a similar community, the plaintiff cannot demonstrate any breach of duty and as such cannot establish a genuine issue of material fact to defeat the summary judgment motion. *Id.* at 831.

The testimony of a physician as to what he would do or his opinion of what should have been done does not prove the statutory standard of medical practice. *Roddy v. Volunteer Medical Clinic, Inc.*, 926 S.W.2d 572, 578 (Tenn. Ct. App. 1998) (citing *Lewis v. Hill*, 770 S.W.2d 751 (Tenn. Ct. App. 1988)). The affidavit must point out the diagnosis, if any, that should have been made as well as the treatment or intervention that

should have occurred to prevent the plaintiff decedent's death. *Estate of Henderson v. Mire*, 955 S.W.2d 56, 59 (Tenn. Ct. App. 1997). Finally, internal policy and procedure cannot, on their own, establish the applicable standard of care in the medical community. *Richardson v. Miller*, 44 S.W.3d 1, 25 (Tenn. Ct. App. 2000).

The affidavit of Nurse Wilson relies upon the Fall Prevention Guidelines from the Livingston Regional Hospital when stating the applicable standard of care. Specifically, her affidavit states:

- 8) That the Fall Prevention Guidelines from the Livingston Regional Hospital states that when a patient enters another care setting, a screening and assessment will be required at the time of admission or transfer. There is no evidence of a fall assessment noted when Ms. Sharon Geesling was transferred to a swing bed.
- 9) That the Guideline at the Livingston Regional Hospital states, in part, that the following measures will be taken.
  - a) Mark the care plan with "Fall Precaution", however, Ms. Geesling's care plan was not marked.
  - b) If a patient is disoriented or confused, unable to understand directions, the chair or bed alarm should be used, however, there is no evidence of a note of bed alarm or chair alarm in use.
  - c) That documentation for patient's fall risk assessment status and interventions, will be noted on the daily flow record of the patients chart, per shift, however there is no notation of any assessment or intervention noted.

Aside from these internal guidelines, the affidavit did not expound upon what was allegedly required by the applicable standard of care. Instead, Nurse Wilson simply points out the deviations from the guidelines that she believes had occurred.

Because a plaintiff cannot solely rely upon internal policy and procedure, such as the Fall Prevention Guidelines from the Livingston Regional Hospital, to establish the applicable standard of care, the plaintiff was required to provide other evidence of the applicable standard of care in the Livingston community. Nurse Wilson's affidavit was the lone medical expert affidavit that the plaintiff relied upon at the summary judgment hearing. In her affidavit, Nurse Wilson cites only to internal hospital documents in establishing the relevant standard of care. In the absence of any additional showing of the applicable standard of care, we do not find that the trial court abused its discretion in holding that the plaintiff failed to meet the burden of proof placed upon him by Tenn. Code Ann. § 29-26-115(a)(1).

Based on the record before us, we hold that the trial court did not abuse its discretion in holding that the appellant's expert affidavit failed to establish the applicable

standard of care required by Tenn. Code Ann. § 29-26-115(a)(1). The appellant's sole reliance on the internal Fall Prevention Guidelines is not sufficient to establish the applicable standard of care. *Richardson v. Miller*, 44 S.W.3d at 25; *Prewitt v. Semmes-Murphey Clinic, P.C.*, No. W2006-00556-COA-R#-CV, 2007 WL 879565, at \* 15 (Tenn. Ct. App. March 23, 2007). It was not an abuse of discretion for the trial court to determine that the affidavit of Nurse Wilson did not properly establish what any applicable nursing standard of care requires. We therefore affirm the trial court's holding.

## C

Finally, the appellant challenges the trial court's holding that the affidavit of Nurse Wilson fails to state that she is familiar with the standard of care that applies to nurses, regardless of the type of medical community involved, in a case involving alleged negligence / malpractice by nurses. Because this court affirms the trial court's ruling on other grounds, we pretermitt this issue.

## IV

For the reasons expressed above, the decision of the trial court granting Livingston Regional Hospital's motion for summary judgment is affirmed and this case is remanded with costs of appeal taxed to appellant, Thomas Geesling, individually and as administrator of the Estate of Sharon Geesling, for which execution may issue if necessary.

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Walter C. Kurtz, Senior Judge